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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 27, 1999

Ms. Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

Re: Comments in the matters of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments, and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Ms. Salas:

Pursuant to the Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket 99-217 and the Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, the Community Associations Institute, the National Association of Housing Cooperatives, and the Cooperative Housing Coalition hereby file an original and six copies of their Comments. CAI, NAHC, and CHC also file an original and six copies of their Response to Initial Regulatory Flexibility Analysis. Copies of the Comments and the Response have been submitted to International Transcription Services.

CAI, NAHC, and CHC appreciate the opportunity to submit their Comments and Response to the Commission in this proceeding.

Sincerely,

Lara E Howley

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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in Local Telecommunications Markets	)	
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking to	)	
Amend Section 1.4000 of the Commission's Rules	)	
to Preempt Restrictions on Subscriber Premises	)	
Reception or Transmission Antennas Designed	)	
to Provide Fixed Wireless Services	)	
	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making and	)	
Amendment of the Commission's Rules	)	
to Preempt State and Local Imposition of	)	
Discriminatory And/Or Excessive Taxes	)	
and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

COMMENTS OF THE COMMUNITY ASSOCIATIONS INSTITUTE, THE NATIONAL ASSOCIATION OF HOUSING COOPERATIVES, AND THE COOPERATIVE HOUSING COALITION

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SUMMARY

Community associations, whether condominium, cooperative, or homeowners associations, support the expansion of the telecommunications marketplace. The growth of this marketplace will permit community association boards of directors and residents to select advanced and competitive services from multiple providers. Community associations look forward to the growth of competition.

The proposals articulated in the *Notice of Proposed Rulemaking* would not promote the growth of competition in the telecommunications marketplace, however. These proposals would seek to solve a non-existent problem in this marketplace. Contrary to the assertions of some providers, community associations are not arbitrarily refusing them access to community association property. In fact, in many regions, community associations have negotiated agreements that are beneficial to both associations and alternative providers. In other regions, associations have sought alternative providers and services, only to receive no proposals. Forced entry prerogatives as proposed in the *Notice of Proposed Rulemaking* would not cure providers' refusals to serve community associations. Instead, forced entry regulations would inhibit the growth of the telecommunications marketplace in both currently competitive and non-competitive environments.

Forced entry proposals would require community associations to relinquish fundamental property rights by permitting telecommunications providers onto association property without the association's consent. These proposals would require permanent physical

occupations of community association property, takings prohibited by the Fifth Amendment to the United States Constitution absent just compensation. Because the FCC does not have the statutory authority that is required to provide just compensation for takings of community association property, the FCC cannot promulgate regulations that directly or indirectly result in takings.

By depriving community associations of their right to control their property, forced entry regulations would also create numerous operational and managerial problems for community associations. Community associations would lose the right to exclude providers that damaged property or injured association residents, so that all providers would have a diminished incentive to prevent damage and injuries. Absent appropriate association control, Telecommunications equipment installation would cause association property to deteriorate at a faster rate than anticipated, requiring additional maintenance. These repair, restoration, and maintenance costs would be borne by the association and its residents, who cannot afford these increased charges.

Additionally, association safety and security concerns would rise with an increased number of telecommunications personnel entering association property. Associations would be held liable for any injury or damage caused by these personnel. Association legal costs would rise, as associations become involved in disputes between various providers serving the association. All of these costs would increase claims on association insurance policies, which would lead to insurance premium rate hikes. Ultimately, community associations would have to finance these additional expenditures through

special assessments on community association residents, the very people whom telecommunications providers claim to be benefiting. The FCC should not burden community association residents merely to benefit exclusively telecommunications providers.

In this proceeding, the FCC also proposes to abrogate or limit exclusivity provisions in telecommunications contracts. Instead of promoting the installation of advanced, competitive services in associations, these proposals would ensure that some associations could never receive these services. In certain circumstances, the promise of exclusivity is the only way to entice a provider to install expensive equipment or charge lower fees for service in community associations. Since exclusivity provisions can be beneficial negotiation tools for community associations, the FCC should not prohibit or limit these options.

The FCC should also not expand the Over-the-Air Reception Devices (OTARD) Rule to cover additional data transmission and reception antennas. In Section 207 of the Telecommunications Act of 1996, Congress intended to preempt association restrictions on only over-the-air reception antennas. The FCC cannot use its ancillary authority to extend Section 207 to invalidate association restrictions on other types of antennas, including data antennas.

Instead of promulgating the types of regulations proposed in this proceeding, the FCC should promote consumer education about the new products and services available in the

marketplace. In that way, community associations will learn about new services and seek to have them offered within the association, while providers will also learn about the specific concerns of community associations. Negotiations would proceed more quickly and efficiently as both parties learn to recognize the specific needs of the other party.

Since the current telecommunications marketplace is swiftly growing without impediment, the FCC should not inhibit this expansion by promulgating forced entry regulations, prohibiting or limiting exclusive contracts, or expanding the OTARD Rule. The marketplace will grow most rapidly and competitively without government intervention.

COMMENTS

Pursuant to the Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 released July 7, 1999, the Community Associations Institute (CAI),[1] the National Association of Housing Cooperatives (NAHC),[2] and the Cooperative Housing Coalition[3] hereby file their Comments. CAI, NAHC, and CHC support the evolution of a competitive telecommunications marketplace, which will benefit all community association residents by providing them with a wider variety of advanced, high-quality, reasonably priced services. However, none of the proposals outlined in this *Notice of Proposed Rulemaking* will promote the growth of this competitive marketplace. Instead of increasing "nondiscriminatory access" to community association residents, these proposals would in reality permit telecommunications providers to force their entry onto community association property, over

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[1] Founded in 1973, the Community Associations Institute (CAI) is the national voice for 42 million people who live in more than 205,000 community associations of all sizes and architectural types throughout the United States. Community associations include condominium associations, homeowner associations, cooperatives and planned communities.

CAI is dedicated to fostering vibrant, responsive, competent community associations that promote harmony, community and responsible leadership. CAI advances excellence though a variety of education programs, professional designations, research, networking and referral opportunities, publications, and advocacy before legislative bodies, regulatory bodies and the courts.

In addition to individual homeowners, CAI's multidisciplinary membership encompasses community association managers and management firms, attorneys, accountants, engineers, builders/developers, and other providers of professional products and services for community homeowners and their associations. CAI represents this extensive constituency on a range of issues including taxation, bankruptcy, insurance, private property rights, telecommunications, fair housing, electric utility deregulation, and community association manager credentialing. CAI's over 17,000 members participate actively in the public policy process through 58 local Chapters and 26 state Legislative Action Committees.

[2] The National Association of Housing Cooperatives (NAHC), organized in 1950, is a non-profit, national federation of organizations and individuals whose goal is to promote the interests of cooperative housing communities. NAHC members include housing cooperatives, regional associations of housing cooperatives, professionals, non-profit groups, government agencies, and interested individuals. Policy is determined by an elected Board of Directors representing all types of members throughout the United States.

[3] The Cooperative Housing Coalition is an association formed by the National Association of Housing Cooperatives (NAHC), the National Cooperative Bank (NCB), the NCB Development Corporation (NCBDC), the Council of New York Cooperatives & Condominiums (CNYC), the Federation of New York Housing Cooperatives (FNYC), and other cooperative member organizations to positively impact public policy through interaction with Congress and government agencies for the purpose of maintaining and enhancing the environment for existing and new housing cooperatives. Organization Members of the Coalition represent over 1.1 million families who own and democratically control the cooperative communities in which they live.

which providers have no ownership right and for which they have no responsibility. These proposals would take away the valuable and intrinsic community association property right to control their own property, regardless of association residents' desires or concerns. Under these forced entry and other proposals, the FCC would be regulating entities over which the Commission has no authority, while permitting those it regulates nearly limitless power to force entry onto and damage property they do not own merely to satisfy a fleeting profit motive. The FCC would also ensure that community associations could not participate as equal players in the marketplace by eliminating or limiting their ability to negotiate competitive contracts that include exclusivity provisions. The FCC also proposes to expand the Over-the-Air Reception Devices (OTARD) Rule beyond its purview. The FCC's proposals would inhibit the expansion of the marketplace, while simultaneously depriving community associations of property and contract rights and eviscerating community association control over property. Since the competitive telecommunications marketplace will expand most effectively in the absence of direct governmental regulation, CAI, NAHC, and CHC urge the FCC to refrain from promulgating the types of regulations proposed in this proceeding.

I. COMMUNITY ASSOCIATIONS MAINTAIN AND CONTROL PROPERTY FOR THE BENEFIT OF ALL RESIDENTS

Analyzing some of the issues presented in this *Notice of Proposed Rulemaking*, requires an understanding of the legal basis and governance structure of community associations. Community associations exist in a wide variety of legal forms and include a variety of architectural structures, differing greatly from other multitenant environments (MTEs) addressed in this proceeding.

While the variety inherent in community association form and structure is infinite, community associations are defined by three shared characteristics: automatic, mandatory membership of a property owner in the community association, the presence of governing documents that bind all owners in the association to the association and to each other, imposing mutual obligations, and a mandatory obligation to pay assessments to maintain the association.[4] In addition, community associations are comprised of property that is owned separately by an individual owner and property owned in common either by all owners[5] jointly or the association. There are three legal forms of community associations: condominiums, cooperatives, and planned communities,[6] which differ as to the amount of property that is individually owned. In condominium associations, an individual owns a particular unit; the rest of the property is owned jointly by all unit owners as tenants in common, although a portion of this common property, such as a carport or a balcony, may be set aside for the exclusive use of one (or more than one but not all) owner (and called limited common property).[7] In cooperative associations, the individual owns stock in a corporation that owns all property as common property; the stock ownership gives the individual the right to a proprietary lease of a unit.[8] In planned communities, an individual owns a lot and improvements on the lot; the association owns the rest of the property, such as a clubhouse, pool, or greenbelts, as common property.[9] Generally, an

[4] Treese, Community Associations Factbook, 3.
[5] In each type of community association, different terms apply to residents who have an ownership interest in the association: unit owner in a condominium, resident or apartment owner in a cooperative, and homeowner in a planned community. For convenience, the term "owner" will refer to all three types of residents with ownership interests.
[6] Planned communities are often called homeowners' associations or property owners' associations.
[7] Unif. Common Interest Ownership Act Section 1-103(8). The Uniform Common Interest Ownership Act (UCIOA) was drafted in 1990 and amended in 1994 by the National Conference of Commissioners on Uniform State Laws to serve as model legislation governing community associations. Twenty-five states and the District of Columbia have passed UCIOA or its predecessor Uniform Acts.
[8] Unif. Common Interest Ownership Act Section 1-103(10).
[9] Unif. Common Interest Ownership Act Section 1-103(4), (7), (23).

owner possesses less individually owned property in a condominium than a planned community, while there is no individual property ownership in a cooperative. Therefore, while individuals do own or use property in community associations, they do not fully own all property in the association. Community associations either own or control association common property, using and maintaining this property for the benefit of all association residents.[10] Mandatory assessments pay for the maintenance of common property.

Community associations come in many architectural styles: high-rise buildings, garden-style units, townhouses, single family homes, to name a few. The architectural style of the association does not necessarily relate to its legal form: a townhome development can be a planned community, a condominium, or a cooperative; a single family home can be in a condominium association. In addition, several community associations can be part of a master association, which controls all aspects of a large development. Association governing documents define the type of association formed.

By virtue of their property interest, community association owners are members of the association's voting body. As such, they are responsible for electing a board of directors to govern the association. In this respect, residents govern themselves since community associations are operated *by* residents *on behalf of* residents. Owners in a community association who are not on the board may participate in governing sessions by attending board meetings and joining various committees. Directly or indirectly, owners have control over the activities that occur in their association and board members

[10] For the purposes of this proceeding, the ownership of common property will be referred to as community association ownership, even though common property may legally be owned by all tenants in common, the cooperative corporation, or the association.

must regularly seek the votes of their neighbors to remain in office. As a result, community associations are particularly accustomed to considering the needs and desires of their residents when determining budgetary expenditures and the use of common property. Such joint ownership, shared governance, and convergent interests differentiate community associations from other MTEs involved in this proceeding.

Community association owners have expressed a high rate of satisfaction with living in a community association.[11] Many owners have indicated that the reasons that they are pleased with their living experience include approval of the appearance and property values of the community, the feeling of security within the association, the financial position of the community, the association's location, and having friendly neighbors.[12] Owners are pleased with the governance, financial operations, and sense of community within their associations.

II. FORCED ENTRY REGULATIONS WOULD NOT PROMOTE COMPETITION

In this proceeding, the Commission has requested comments on whether it should promulgate regulations that permit telecommunications providers to have access to MTE property, regardless of the MTE's concerns or desires. Due to the coercive effect of these proposals, they cannot be accurately termed as "nondiscriminatory access" or "competitive access" initiatives. Instead, these proposals would deprive community associations or their property rights. By taking away community

[11] National Survey of Homeowner Satisfaction, 6 (conducted by the Community Associations Institute Research Foundation, 1999). 75% of association owners are extremely or very satisfied with living in their association.
[12] National Survey of Homeowner Satisfaction, 8.

association control over access to property, these forced entry proposals contradict this nation's culture and laws.

The FCC proposes several forms of forced entry: through use of utility rights of way;[13] through use of incumbent local exchange (ILEC) provider networks;[14] or through access to MTE property.[15] These proposals are unnecessary, since in many areas competition in the community association marketplace is growing.[16] There is no credible evidence proving that it is community association refusal to permit telecommunications providers access to association property that is an impediment to the growth of this marketplace. Instead, the evidence suggests that the free market economic forces in some areas are the determining factors: telecommunications providers are unwilling to serve community associations without incentives.[17] In addition, these proposals would cause a myriad of constitutional and legal complications, destroy the democratic decision-making processes in community associations, pose multiple threats to the safety and integrity of community association property, and be incompatible with the Over-the-Air Reception Devices (OTARD) and cable inside wiring rules. The

[13] In the Matters of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments, and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98,*Notice of Proposed Rulemaking and Notice of Inquiry and Third Further Notice of Proposed Rulemaking (Notice of Proposed Rulemaking),* paragraphs 39-48.

[14] *Notice of Proposed Rulemaking*, paragraphs 49-52.

[15] *Notice of Proposed Rulemaking*, paragraphs 52-63.

[16] CAI has surveyed its membership to determine the state of telecommunications competition in community associations. The survey results demonstrate that in many associations, competition exists..

[17] See Appendix A, 2. Providers have refused access to community associations because it was not cost effective or because either the association or individual units could not adequately receive signals. See also, Comments of Marjorie Meyer; Comments of Palm Springs II Condominium Association, 5.

FCC should not adopt such inappropriate public policy proposals that would so clearly run counter to the best interests of community association residents.

A. The Marketplace Is Driving Competition; Forced Entry Privileges Are Not Necessary

One of the arguments in favor of forced entry privileges is that the telecommunications marketplace is insufficiently competitive due to barriers raised by community associations and other MTEs. Many telecommunications providers have asserted that community associations have not permitted them access to association property to install equipment to offer service to community association residents. Other providers have also argued that the negotiation process between provider and MTE takes too long to complete, so forced entry is needed to expedite this process. Certain providers assert that forced entry privileges would enable them to provide service to MTE residents more quickly.[18] However, current reality belies these arguments. The telecommunications marketplace is growing rapidly in the absence of forced entry privileges, with demand for advanced services by community associations outpacing the desire, willingness, and ability of providers to serve those associations. Forced entry would inhibit the growth of this marketplace, unfairly favoring some (usually incumbent) telecommunications providers to the detriment of community associations, residents, and even other telecommunications providers.

The telecommunications marketplace has been growing exponentially in the past several years. Numerous new providers have entered the arena to offer advanced telephony, video, and data services.

[18] U.S House of Representatives Committee on Commerce, Subcommittee on Telecommunications, Trade, and Consumer Protection, Hearing on Access to Buildings and Facilities by Telecommunications Providers, May 19, 1999, Oral Testimony of William J. Rouhana, Jr., Chairman and Chief Executive Officer, WinStar Communications, Inc.

Alternatives to traditional cable franchise and local telephone service are gaining ground in some (usually highly urbanized) areas. Community associations are helping to drive the development of this marketplace. They are working diligently and effectively to secure the telecommunications services requested by residents while ensuring that the delivery of such services does not damage the substantial investment that owners have made in association property. In regions where competition exists, many community associations have engaged in successful negotiations with telecommunications providers.[19] If certain telecommunications providers have not gained access to community associations, it is due to a lack of demand for their services, historically poor service rendered to other associations, noncompetitive prices or services, concern over potential damage to association property, the scarcity or absence of available space, or other such legitimate concerns.[20] It is not due to association intransigence or inappropriate negotiations between telecommunications providers and community associations.

Community associations choose telecommunications services from alternative service providers that provide high quality, reasonably priced, flexible services that are demanded by association residents. Forced entry policies would deter the growth of the competitive marketplace, and instead, would create artificial markets by granting privileges to initial providers that are able to commandeer limited space before others arrive or low quality telecommunications service providers that would otherwise be

[19] See Appendix B, Comments of Samuel L. Dolnick, 4-5; Comments of Maplewood Park Place, 4; Comments of Gretchen Overdurff, 2 (who anticipates successful negotiations); Comments of Scottsdale Park Community Association.
[20] See Appendix A, 1. About seven percent of the respondents noted that they had refused access to telecommunications providers. Reasons for denial of access included the fact that the provider had not requested permission to enter the property, provider desire to use common property not available for antenna installation, safety concerns, damage concerns, record of prior damage. No association reported refusing access to a provider because the provider would not pay access fees. See also, Appendix B, Comments of Chocolate Factory Condominium Association (security, safety, and property damage concerns).

unable to compete based on the quality of, demand for, and cost of their services. With any provider able to force installation of telecommunications equipment on association property, providers would not have to demonstrate service quality and competitive pricing or address any other legitimate concerns for the valuable and limited space they would require. Therefore, forced entry policies would impede the growth of quality competition and possibly prevent association residents from receiving better services from newer, more professional providers. In that vein, forced entry privileges are extremely anti-competitive and would not advance the FCC's intent or community associations' desires for advanced services.

In many other regions, community association demand for advanced services is far ahead of telecommunications providers' desire to serve associations. In several instances, community association boards and managers seeking alternative providers to serve associations have been rebuffed by telecommunications providers that are not interested in serving associations.[21] It is misleading and irresponsible for providers to assert that community associations refuse them access when they have either not requested access or refused to serve associations.

B. Forced Entry Regulations Would Violate the Takings Clause of the Fifth Amendment to the United States Constitution

The FCC proposes that telecommunications providers be permitted to use utility, ILEC, or community association property to install telecommunications equipment regardless of the property owners'

[21] See Appendix A, 1; Appendix B, Comments of Marjorie Meyer; Comments of Palm Springs II Condominium Association, 5.

desires. Installation of telecommunications equipment on utility, ILEC, or community association property would be a permanent physical occupation of this property, implicating the Takings Clause of the Fifth Amendment to the United States Constitution.

The forced entry cable statute considered in Loretto v. Manhattan Teleprompter[22] granted the same types of forced entry privileges as those proposed by the FCC. In Loretto, the New York statute required building owners to make their properties available for cable installation, providing only nominal compensation for the space occupied. The Supreme Court ruled that this installation amounted to a permanent physical occupation of the landlord's property and that even the slightest physical occupation of property, in the absence of compensation, is a taking.[23] The Court further reasoned that permanent occupancy of space is still a taking of private property, regardless of whether it is done by the state or a third party authorized by the state.[24]

The forced entry scenarios envisioned by the FCC would create this invalid permanent physical occupation of utility, ILEC, or community association property. The New York statute invalidated in Loretto permitted a provider to install "plates, boxes, wires, bolts, and screws" on the landlord's property.[25] Such "placement of . . fixed structures" was held to be a permanent physical occupation.[26] Under the proposals articulated in this proceeding, telecommunications providers would be installing the same equipment as that installed in Loretto on the same type of property. It is irrelevant whether

[22] 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 868 (1982).
[23] Loretto, 458 at 427.
[24] Loretto, 458 at 432, n.9.
[25] Loretto, 458 at 438
[26] Loretto, 458 at 437.

the property is taken pursuant to an expansion of a utility right of way or ILEC networks or use of other community association property. Any installation of telecommunications equipment on community association property would constitute a taking of community association property. Therefore, any forced entry proposal would be unconstitutional unless just compensation were provided.

Even utility easements or rights of way are subject to this constitutional analysis. Easements in property are the same as any other interest in property; as such, an easement cannot be taken without just compensation.[27] Therefore, the Loretto analysis would apply to the taking of an easement, particularly one in which the utility has been granted no greater rights than to install its own equipment.[28] The FCC requests comments on whether any rule requiring use of utility rights of way or ILECs networks on community association property would implicate the Fifth Amendment.[29] This situation would certainly be a taking, because utilities would be using community association property they do not own in order to permanently install equipment owned by other telecommunications providers without the association's permission. This situation would be the same as that presented in Loretto. Any forced entry proposal that permits the taking of such an easement would encounter the same difficulties as the taking of community association property.[30]

[27] Kaiser Aetna v. U.S., 444 U.S. 164, 180, 100 S.Ct. 383, 393, 62 L.Ed.2d 332 (1979).
[28] The scope of an easement is a matter of state common law. Generally, a community association would have to consent before broadening the amount of property subject to the easement; but in some states the utility can broaden the scope of the easement. In other states, other rules apply.
[29] *Notice of Proposed Rulemaking,* paragraph 47.
[30] See Media General Cable v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169 (4th Cir. 1993).

The situations presented by all three forced entry scenarios would be the same as that in Gulf Power v. FCC.[31] In Gulf Power, the court held that the 1996 amendments to the Pole Attachment Act compelling utilities to provide access to all telecommunications and cable providers constituted a taking of utility property similar to Loretto.[32] The only reason that this provision survived court scrutiny was that the 1996 amendments contained a compensation provision.[33]

Another question posed by the FCC is whether ILEC wiring can be used by alternative telecommunications providers for the simultaneous transmission of telecommunications signals. As articulated in earlier proceedings,[34] CAI, NAHC, and CHC support FCC proposals to promote the simultaneous use of ILEC (and other inside) wiring in community associations. But CAI, NAHC, and CHC also recognize the constitutional taking arguments regarding any FCC regulation requiring simultaneous use of wiring. Therefore, the FCC should carefully examine the issue of mandatory simultaneous use of ILEC wiring.

The *Notice of Proposed Rulemaking* also requests comments on whether any level of just compensation to be paid by telecommunications providers for access to community association

[31] 998 F.Supp 1386 (N.D. Fla. 1998).
[32] Gulf Power, 998 F. Supp. at 1393.
[33] Gulf Power, 998 F. Supp. at 1398.
[34] See CAI's Comments and Reply Comments in the consolidated proceeding *of In the Matter of: Preemption of Local Zoning Regulations of Satellite Earth Stations: IB Docket No. 95-59; In the Matter of: Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services: CS Docket No. 96-83* and *In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment, CS Docket No. 95-184 and In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM 92-260.*

property should be set at the level that is charged providers serving associations.[35] As argued below, Bell Atlantic v. FCC prohibits the FCC from mandating takings of community association property.

In addition, while the prospect of receiving compensation from a telecommunications provider in exchange for granting a privilege to access the property is generally not an issue for community associations since they seek the most favorable package of services or rates for residents rather than any financial compensation for the association,[36] it would nevertheless be inappropriate for the FCC to attempt to limit the rights of community associations to explore compensatory opportunities. One entity negotiating a payment from another for the use of property, wiring, market access, etc. is absolutely in keeping with the spirit of a competitive marketplace. The amount of compensation paid by one provider may not be an appropriate level for another provider to pay. The FCC should refrain from establishing compensation schedules paid by providers for the use of association property.

Any use of utility, ILEC, or community association property by the FCC for the installation of telecommunications equipment would be a taking of private property prohibited by the Fifth Amendment to the United States Constitution. The FCC cannot mandate a taking in the absence of express Congressional authority. Therefore, the FCC cannot promulgate forced entry regulations.

[35] *Notice of Proposed Rulemaking*, paragraph 60.
[36] See Appendix A, 14. Only a small percentage of associations charge any fees for access to association property. Of that small percentage (an average of eight percent), only half of those associations charge access fees for serving community association residents. Associations obtain revenue from providers leasing association property for transmittal antennas in about one-third of the cases.

C. The FCC Has No Ancillary Authority to Promulgate Forced Entry Regulations

The *Notice of Proposed Rulemaking* inquires whether the FCC has the legal authority to permit telecommunications provider use of utility rights of way, ILEC networks, or community association property for the installation of telecommunications equipment. Since the FCC cannot exert authority over community associations or their property without an express Congressional mandate, the FCC cannot adopt forced entry regulations.

In order for the FCC to provide the compensation necessary to permit forced entry takings of community association property, the FCC must have the statutory authority to do so. In Bell Atlantic v. FCC,[37] the court held that since the Communications Act of 1934 did not expressly grant the FCC the authority to take private property, the FCC could not imply the authority to do so. The FCC argued in that case that it had the power to obligate local telephone exchange carriers ("LECs") to permit competitive access providers ("CAPs") onto LEC property to connect their cables to those of the LECs. The court determined that this rule required a taking of LEC property under Loretto.[38] The FCC then asserted that the Communications Act of 1934 granted the FCC the authority to take private property pursuant to its power to require carriers to "establish physical connections with other carriers."[39] The court held that this language was insufficient to create the authority to take private property,[40] because statutes purporting to authorize takings must be construed narrowly when implicating constitutional questions.[41] The FCC asserted that the takings power could be implied from

[37] 24 F.3d 1441 (D.C. Cir. 1994).
[38] Bell Atlantic, 24 F.3d at 1445.
[39] 47 U.S.C. Section 201(a).
[40] Bell Atlantic, 24 F.3d at 1446.
[41] Bell Atlantic, 24 F.3d at 1445.

the statute, to which the court replied "such an implication may be made only as a matter of necessity, when the grant [of authority] itself would be defeated unless [takings] power were implied,"[42] to prevent the Treasury from being charged with unanticipated expenses not specifically authorized by Congress.[43] The court did not find such necessity in the Bell Atlantic situation and therefore held that the FCC had exceeded its statutory authority in promulgating the rule.

The FCC's proposed forced entry scenarios are analogous to those outlined in Bell Atlantic, regardless of the type of property taken. Here, the FCC proposes to permit telecommunications providers to use property they do not own for the installation of telecommunications equipment. However, no statute explicitly grants the FCC the authority to provide compensation to the takings of utility, ILEC, or community association property required for the installation of telecommunications equipment. Under Bell Atlantic, the FCC cannot imply the authority to provide this compensation. It is irrelevant that the property the FCC proposes to take is utility, ILEC, or community association property, although any taking of community association property would be an even more egregious taking, since the FCC has no regulatory authority over community associations and association residents. The Loretto and Bell Atlantic analyses prohibit forced entry of any type.

The FCC cannot use any ancillary jurisdiction authority to adopt forced entry regulations. Prior attempts to gain forced entry privileges have been rejected because there was no statutory authority for these privileges. For example, in Cable Investments, Inc. v. Woolley,[44] the court held that since

[42] Bell Atlantic, 24 F.3d at 1446 (citations omitted).
[43] Bell Atlantic, 24 F.3d at 1445.
[44] 867 F.2d 151 (3rd Cir. 1989).

Congress had deleted proposed section 633, which would have mandated forced entry into MTE buildings, from the Cable Communications Policy Act, there was no authority in the other sections of the Act to require forced entry.[45] Cable providers could not assert that forced entry privileges existed except through Congressional authorization of those privileges.[46]

Additionally, the FCC has no jurisdiction over community associations. Community associations are not covered in the definitions of service providers under the Communications Act, since they do not engage in the business of wire or radio communications.[47] Just because telecommunications services may be present on community association property does not render associations providers of these services. Nor can the FCC assert that it has ancillary jurisdiction over community associations as entities. Even though the FCC does have broad ancillary jurisdiction over telecommunications providers,[48] that jurisdiction does not extend to authority over their non-telecommunications services.[49] The FCC does not have authority over community associations' property merely because telecommunications services may be affected by associations' use of their own property.[50] Since community associations are not entities regulated by the Communications Act, it follows that their property cannot be used by the FCC to promote the development of telecommunications services.

[45] Cable Investments, 867 F.2d 156-58. See also, Century Southwest Cable Television, Inc. v. CIIF Associates, 33 F.3d 1068 (9th Cir. 1994); Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600 (11th Cir. 1992); Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169 (4th Cir. 1993).
[46] Cable Investments, 867 F.2d 158.
[47] See 47 U.S.C. 153.
[48] U.S. v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).
[49] GTE Services Corp. v. FCC, 474 F.2d 724, 735-36 (2nd Cir. 1972).
[50] See Illinois Citizens Committee for Broadcasting v. FCC, 467 F.2d 1397, 1400 (7th Cir. 1972).

The FCC next requests comments on tentative conclusions that the FCC has the authority to permit telecommunications providers to use utility rights of way on community association property.[51] While section 224 of the Communications Act grants telecommunications providers and cable television providers access to utilities' poles, ducts, conduits, and rights-of-way,[52] that does not mean that the FCC can permit any use of community association property that happens to be used by a utility.[53] The nature and scope of utility rights of way or easements are issues determined by state law. In some states, utility easements are interpreted to grant utilities the rights to control the use of the easement; in other states, the community association retains that right. The rights of the utilities to expand the easement would depend on the way the easement is drafted and the proposed location of the new installations. State law is not clear As a general rule, however, the established common law concerning easements holds that neither the easement nor its use can be expanded absent the consent of the holder of the servient estate, in this case the community association. Therefore, any rule that the FCC would adopt regarding use of utility easements would conflict with common law on easements. The FCC has no authority to define common law, so the FCC cannot permit use of utility easements by telecommunications providers on association property.

Only Congress can mandate forced entry; the FCC cannot use its ancillary jurisdiction authority to do so.

[51] *Notice of Proposed Rulemaking*, paragraphs 36-49.
[52] 47 U.S.C. Section 224(f)(1).
[53] The size of the association will dictate the percentages of utility, telecommunications, and video providers that have easements, rights of way, or other privileges on association property. Usually, these rights were granted by contract, eminent domain, or informal agreements. See Appendix A, 3-7.

D. Forced Entry Proposals Ignore the Democratic Decision-Making Process in Community Associations

Many telecommunications providers have premised their demands for forced entry privileges based on an erroneous assumption that community associations are prohibiting or limiting providers from entering association property in order to offer services to residents. This is false. In fact, community associations use a fair and representative method for ensuring that residents' telecommunications needs and desires are met while maintaining the integrity of association property. The governance structure of community associations belies the providers' arguments.

In community associations, the board of directors – *comprised of owners elected by owners* – is legally obligated to make decisions regarding the use and maintenance of common property. The board seeks to accommodate the desires of community association residents while protecting the concerns and interests of all association residents in all areas of association life. In selecting telecommunications providers, boards are no different. They seek to choose providers that will offer the most attractive package of services for all association residents.[54] Through boards of directors, owners select their service providers. Their choices, including whether to exclude certain providers from association property for a variety of reasons,[55] must be respected. The FCC should not overturn established community association law through forced entry regulations that will not promote competition. Providers will achieve their objectives through competitive negotiation with community associations in

[54] See, Appendix B, Comments of Century Park Condominium Association; Comments of Samuel L. Dolnick, 2-5; Comments of Maplewood Park Place, 4; Comments of Montpelier Community Association; Comments of Gretchen Overdurff, 2.

[55] Community associations have legitimate reasons for refusing to permit providers on association property: increased safety concerns, the potential for damage to association property, providers' unreasonable space demands, providers' previous history of damaging association property. See Appendix A, 1.

offering the best services to residents. Forced entry only permits telecommunications providers to ignore the desires of community association residents.

Increasingly, community association residents are seeking newer, faster, and more sophisticated telecommunications capabilities. In response to such demands, boards of directors are looking to viable competition among telecommunications companies – and the advancements that such competition will produce – as means to provide more advanced and affordable services to the community.[56]

In earlier forced entry proceedings, the Public Service Commissions of Florida and Nebraska recognized that community association residents choose their telecommunications providers. Florida and Nebraska recognized that the decision-making process in community associations is both legal and appropriate and that any policy regarding forced entry or exclusive contracts should not apply to community associations.[57] The FCC should also recognize that forced entry regulations are not only inappropriate but also counterproductive to the goal of expanding telecommunications services to community association residents.

[56] See, Appendix B, Comments of Century Park Condominium Association; Comments of Samuel L. Dolnick, 2-5; Comments of Maplewood Park Place, 4; Comments of Montpelier Community Association; Comments of Gretchen Overdurff, 2.

[57] Florida Public Service Commission, *Report on Access by Telecommunications Companies to Customers in Multitenant Environments*, February 1999, ii, 10, 14; Commission Motion to Determine Appropriate Policy Regarding Access to Residents of Multiple Dwelling Units (MDUs) in Nebraska by Competitive Local Exchange Providers, Application No. C-1878/PI-23, *Order Establishing Statewide Policy for MDU Access* at 6 (March 2, 1999).

E. Forced Entry Would Eviscerate Community Security, Safety and an Association's Responsibility to Manage Common Property

The FCC requests comments on the practical effects of forced entry regulations.[58] Removing an association's prerogative to regulate the access of providers to association property would limit the association's ability to protect residents, the equipment and services of all providers, and the property itself. In such an environment, resident safety and security would be compromised and association risks and liabilities would escalate. Forced entry would also eliminate community association choices over the use of association property.

As a preliminary matter, the FCC requests information on the different types of engineering arrangements within community associations.[59] While CAI, NAHC, and CHC cannot provide specific technical information on this issue, CAI, NAHC, and CHC can note that telecommunications equipment is installed in many different configurations, depending on community association size, architectural style, density, the technology to be installed, and other factors.[60] When evaluating this diversity, the FCC should recognize that any forced entry regulation could not adequately address all of these different situations.

Forced entry proposals undermine every responsibility associations have to properly serve their residents and to protect, preserve, and maintain the association property. Equipment and wiring installation usually involves altering roofs, walls, floors, and ceilings in buildings and digging through roads, sidewalks, and yards. This activity often causes damage, requiring additional expense to restore

[58] *Notice of Proposed Rulemaking,* paragraph 47.
[59] *Notice of Proposed Rulemaking,* paragraph 60.
[60] CAI has collected information regarding ownership and control of association conduit and riser space, which depends upon the community association's size. Appendix A, 8.

the property. With its authority to permit or deny access to association property and to require that all providers negotiate a written agreement governing their conduct, an association can choose telecommunications providers that will not damage association property during equipment installation and maintenance, and insure that any damage is properly repaired and paid for by the provider causing the damage.[61]

In a forced entry environment, all telecommunications providers could access an association regardless of how they treat the property and would have less of an incentive to prevent damage to common property because their lack of care could not be a basis for exclusion. The association and its owners, not the telecommunications providers, would be required to bear the financial burden of repairs. In many associations, there would be inadequate funding to repair or even attempt to recover repair costs for such damage without a special assessment. Special assessments cause great burdens for association residents, the very people whom telecommunications providers assert to serve. It would be inappropriate for community association residents to assume telecommunications providers' costs.

With multiple service providers having the unrestricted right to enter an association, the potential for damage to common property and telecommunications equipment, or injury to association residents and personnel, would increase exponentially. Since multiple providers would often be using the same portions of common property, it is conceivable that such areas would be damaged, restored to some

[61] Even without forced entry privileges, some providers have installed equipment without association consent. This trespass onto association property has damaged expensive maintenance projects. Appendix A, 11-12. Approximately 20% of respondents indicated that providers had entered community association without permission. Of those that reported unauthorized entry, at least 40% had experienced damage to the property as a result of the trespass. See also, Appendix B, Comments of Hunters Woods Condominium Association. This type of damage will only increase with forced entry.

extent, then damaged again by another provider. It is also conceivable that a new provider would damage a previous provider's telecommunications or utility equipment during installation. The association would swiftly become involved in the dispute between the providers concerning responsibility for damage. These types of conflicts would increase association litigation costs, which few associations can afford. It is fundamentally unfair for associations to become involved in these disputes when they would have no ability to prevent this damage.

The potential for increased damage would raise community associations' operating costs. The damage caused by multiple providers would create wear and tear on association property, requiring repair and replacement much sooner than anticipated by associations. The drain on association reserve funds, most of which are inadequately funded at the outset, would surely increase. Installation of telecommunications equipment on roofs and other property covered by warranties may void these warranties, with the association becoming responsible for major renovation and construction projects. Associations and their residents cannot afford these costs.

If telecommunications providers damage property or injure association residents, it is likely that the association would be held liable since it has the responsibility to decide what contractors and service providers operate within the community. Yet, forced entry policies would negate the existing rights of associations to limit the risk of damage or injury and minimize the disruption to common property, telecommunications equipment, and association residents. Instead, it would impose upon associations the expensive and burdensome task of trying to hold telecommunications providers liable for damage

and injury after the fact, instead of controlling association property and negotiating appropriate agreements with providers to prevent damage in the first place.

Forced entry would also pose increased risks to the security of association property, residents, and personnel. Community associations usually maintain control over the number of non-association personnel on their property, in order to protect association residents. Increased numbers of telecommunications personnel on community association property pose greater risks of damage or injury. This would be particularly true since associations would not be able to control the number of provider employees on the property. To adequately protect the association, association employees would be required to spend additional time escorting and supervising providers' employees. This time would detract from other personnel duties. Therefore, associations would be faced with a difficult choice: not being able to watch additional provider employees on the property or hiring additional personnel to watch the providers' employees or perform essential management functions. Either way, the association suffers.

Association insurance premiums would surely rise under forced entry regulations. Failure to maintain telecommunications equipment on common property could also cause property damage, exposing the association to additional claims and resulting rising premiums. In addition, conflicts between telecommunications providers could easily involve the association, leading to association claims on its insurance for defending these claims. Residents could also try to involve the association if promised service does not materialize, even though the association cannot control service quality. Increased risks of personal injury or property damage would raise the association's general insurance premiums.

At some point, insurance providers may start denying associations coverage for costs related to such disputes. Associations should not have to bear those burdens.

Throughout the *Notice of Proposed Rulemaking*, there is an underlying assumption that all telecommunications providers, especially alternative providers, are professional companies with high standards of quality and service. While many providers exemplify these high standards, unfortunately there are also providers that provide poor quality service performed by inexperienced personnel.[62] Under forced entry regulations, however, community associations could not exclude these poor providers. Community associations be forced to permit these providers onto their property even though they know from other associations that the providers damage property, install equipment poorly, offer inferior service, do not respond to service calls, and employ untrained personnel. Associations would be powerless to prevent the destruction of their property. The FCC could not possibly intend this unfair and devastating result.

The FCC seeks comment on the availability of space in community associations for telecommunications equipment installation.[63] While the space available in a particular association depends on association size, architectural style, and other factors, real estate is a finite resource and common area space is always limited. It is simply not possible for community associations to accommodate an unlimited number of providers. It is this reality that seems to make forced entry so appealing to providers already in the marketplace. Not only do they see a prospect of advancing their

[62] Appendix B, Comments of Amalgamated Housing Cooperation, 1; Berkeley Town House Cooperative Association; Comments of Samuel Dolnick, 3-4; Comments of Federation of New York Housing Cooperatives; Comments of Palm Springs II Condominium Association, 6-8
[63] *Notice of Proposed Rulemaking,* paragraph 63.

immediate business plan, they also understand that a forced entry environment would enable them to preclude future competitors by installing equipment and wiring in as many buildings as possible so there would be no remaining space when new providers come to call.

Not only would such a rush to occupy space likely result in poor quality installations and increased damage to common property, but community association residents would also suffer in such a forced entry environment because competition would be limited. A new provider could be just what the residents desire, but the association would be precluded from adding the services or substituting the new provider for an incumbent because providers and not the association controlled the space allocations. Community associations must maintain their rights and flexibility to select a balance of providers in order to respond to resident requirements and ensure a wide diversity of services within the property. Forced entry would deprive community associations of these rights.

Community associations have a responsibility to use common property in a productive manner for all residents. With forced entry, telecommunications providers will be overriding boards' decisions regarding the use of common property space. If a board determined that a particular portion of common property should be used for one purpose, but a telecommunications provider wanted to use that portion for the installation of telecommunications equipment, then the provider may be able to do so. Therefore, community associations would lose the right to determine uses for their own property. The board, not telecommunications providers, knows how to use community association property for the benefit of all residents. Telecommunications providers should not be permitted to override these decisions.

Forced entry would destroy community association owners' expectations. As indicated above,[64] most owners are very satisfied with living in their particular community association. Forced entry regulations would diminish their satisfaction in their association by diminishing property values, damaging association property, and compromising association financial and physical security. The FCC should not destroy owners' enjoyment of their homes and communities.

The FCC requests comments on whether forced entry rights would create problems of incompatibility among various providers and utility companies.[65] CAI, NAHC, and CHC do not have the technical knowledge to address incompatibility problems. However, CAI, NAHC, and CHC can anticipate that associations would become embroiled in disputes among providers and utilities over any incompatibility problems that arise, if only because the installations are on association property. These entanglements could easily increase association liability and legal costs.

The FCC also requests comment on the impact of any forced entry rights extending to utility rights of way or ILEC networks that are located on association property.[66] These forced entry privileges would exacerbate associations' concerns, damage, and liability, since providers could easily install equipment on property outside the boundary of the right of way or network without being aware of their trespass. The association would not know about this installation until a later time, after the damage has occurred. Increased installations through rights of way or networks increase the potential for property

[64] See I, supra.
[65] *Notice of Proposed Rulemaking* paragraph 63.
[66] *Notice of Proposed Rulemaking,* paragraph 39.

damage, personal injury, breach of security, warranty loss, insurance premiums, and association liability for installations they cannot control and of which they may not even be aware.

Forced entry would create myriad operational impediments for community associations. Associations would be subject to increased security and damage risks, maintenance and legal costs, and liability. Simultaneously, community associations would lose control over their property. The combination of these factors would destroy the enjoyment and value of individual residences within associations, harming community association residents.

F. Forced Entry Regulations Would Be Inconsistent with the FCC's Over-the-Air Reception Devices (OTARD) Rule

The *Notice of Proposed Rulemaking* invites comments as to whether any forced entry regulation would be consistent with the OTARD Rule preempting certain community association restrictions on direct broadcast satellite (DBS), television broadcast, and multipoint distribution service (MDS) antennas.[67] Any forced entry regulation would be inconsistent with the OTARD Rule.

One of the major issues in the OTARD proceeding was whether Section 207 of the Telecommunications Act of 1996 granted the FCC the authority to permit individual antenna installations on common property. After extensive discussion and analysis, the FCC correctly

[67] *Notice of Proposed Rulemaking,* paragraph 60.

determined that Section 207 does not permit takings of common property.[68] Because Section 207 did not authorize takings, the FCC can not use Section 207 authority to do so.

To promulgate forced entry in the absence of statutory authority would contradict the FCC's OTARD decision. As Commissioners Ness and Powell have observed, forced entry provisions would create a greater intrusion onto community association property than would the OTARD Rule.[69] Because the FCC determined that it did not have the authority to take common property in the OTARD proceeding, it cannot now decide that the Commission has the authority to take an even greater amount of community association property and to override the decision-making authority of elected boards of directors through forced entry. The FCC correctly determined in the OTARD proceeding that the Commission does not have the authority to permit takings of common property and should not reverse that decision in this proceeding.

G. Forced Entry Would Destroy the Effectiveness of the Cable Inside Wiring Rules

Any forced entry regulation would destroy the effectiveness of the FCC's cable inside wiring rules.[70] One of the purposes of the cable inside wiring rules was to promote competition in the MTE market by providing a structure to determine the disposition of cable inside wiring when a multichannel video program distributor (MVPD) no longer had a "legally enforceable right" to remain on MTE property.[71] Under forced entry proposals, an incumbent MVPD would retain this right to remain in perpetuity.

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[68] *OTARD Second Report and Order*, 13 FCC Rcd. at 23894-96, paragraphs 39-43.
[69] *Notice of Proposed Rulemaking,* statements of Commissioners Susan Ness and Michael K. Powell.
[70] See *Notice of Proposed Rulemaking,* paragraph 47.
[71] See, Telecommunications Services Inside Wiring, CS Docket No. 95-184, Implementation of The Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Docket No. 92-260, *Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 3659 (1997),

Therefore, there would be no negotiation for the purchase, abandonment, or removal of incumbent MVPD equipment, since the inside wiring rules would never become enforceable. Permitting incumbent MVPDs to remain on community association property in perpetuity (especially when the association wants to contract for services with another, more competitive provider) runs counter to all FCC attempts to promote the development of a competitive marketplace. The FCC should not destroy the effectiveness of the cable inside wiring rules by adopting forced entry regulations.

H. The Specific Forced Entry Initiatives Proposed by the FCC Would Not Increase Competition

In the *Notice of Proposed Rulemaking*, the FCC has requested comments on several types of forced entry proposals. Notwithstanding the fact that CAI opposes any forced entry regulations, CAI would like to express the following comments on several of these issues.

The FCC seeks information regarding the effectiveness of forced entry statutes and regulations in Connecticut, Ohio, and Texas.[72] CAI attorney, homeowner, and community association manager members have indicated that telecommunications providers have not utilized these forced entry statutes to gain access to association property, choosing to negotiate agreements with associations.[73] These statutes and regulations were passed prior to the implementation of the Telecommunications Act of

[72] *Notice of Proposed Rulemaking*, paragraph 62.
[73] See Appendix B, Comments of Marjorie Meyer; Comments of Matthew Perlstein. CAI's survey of community associations demonstrates that not a single respondent from Connecticut, Ohio, or Texas has experienced any use of these states' forced entry statutes or regulations.

1996, with which they are incompatible. Since 1997, all states[74] that have considered forced entry proposals have recognized their ineffectiveness and rejected them.[75]

In regard to preempting state forced entry statutes,[76] the it is more advantageous not to promulgate any forced entry regulation. If any action is necessary, then state forced entry statutes and regulations should be preempted, since they are not promoting competition. Forced entry privileges favor the incumbent provider and are inherently unfair to community association residents and all alternative providers. Forced entry statutes and regulations create perpetual rights of entry for the first provider to the exclusion of all others and effectively deny community associations access to new and innovative telecommunications services in situations in which space is limited. Such laws and regulations inhibit competition, violate associations' property rights, and hinder consumer choice. The FCC should seek to remove impediments to a competitive marketplace, not create them by promulgating forced entry regulations.

The FCC asks whether a forced entry regulation should be adopted that is limited to MTEs that already have one provider on the property.[77] Notwithstanding the fact that most associations currently have at least two providers serving the association (telephone and cable providers), this type of regulation would present the same constitutional, legal, and other issues that are presented by absolute forced entry privileges. Community associations would still lose control over their property. The situation

[74] Including Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Missouri, Nebraska, and Virginia.
[75] In Australia, forced entry statutes have caused a great deal of property damage and public outcry. See Appendix B, Comments of Anna Edwards.
[76] *Notice of Proposed Rulemaking,* paragraph 62.
[77] *Notice of Proposed Rulemaking,* paragraph 60.

presented by this type of regulation would be the same as that proposed by a regulation that required a community association that contracted to operate a small convenience store on the property to permit every convenience store in the area to take association space to set up a store. A regulation permitting all convenience stores to enter association property would be considered untenable; forced entry regulations permitting all telecommunications providers to enter property if one provider has already done so must be considered in the same manner.

The FCC proposes that telecommunications providers could utilize any community association-owned telecommunications wiring or equipment. This type of regulation would hinder the growth of the competitive market in these associations, since it would inhibit the development of any association-driven technological or infrastructure investments or improvements.[78] While few associations currently own and operate telecommunications systems, associations seeking to install their own telecommunications systems may refrain from doing so if any telecommunications provider has the right to use the system. Use of association telecommunications facilities by providers may cause interference and other technical impediments. This solution also implicates the takings issue, since association property would be occupied by telecommunications providers. In addition, if association telecommunications equipment is insufficient to meet the providers' needs, then providers would demand additional space, which would also implicate the takings issue. Permitting providers to use association telecommunications systems would raise the same issues as other forced entry regulations.

[78] See, *Notice of Proposed Rulemaking*, paragraph 60.

Forced entry regulations would not address a major issue of concern to community associations: the absence of interested telecommunications providers. In many areas, providers have not expressed interest in serving associations and have even refused to submit proposals.[79] Instead of permitting telecommunications providers to serve any MTE they want but refusing to serve MTEs that will not profit them, the FCC should couple any forced entry regulation with a universal service requirement.

Forced entry regulations are not necessary to promote the expansion of the telecommunications marketplace. In addition, these proposals would violate the Constitution, exceed the FCC's statutory authority, eviscerate the democratic decision-making process inherent in community associations, cause increased safety, security, and damage risks, liability, and legal costs, lead to technical incompatibility problems, contradict the OTARD Rule, and render the cable inside wiring rules unenforceable. Therefore, the FCC should refrain from adopting such regulations. The telecommunications marketplace will achieve more competitive growth without FCC regulation.

III. THE FCC SHOULD NOT TERMINATE OR PROHIBIT EXCLUSIVE CONTRACTS

In this proceeding, the FCC requests comments on whether it should terminate or limit existing or prospective exclusive contracts between telecommunications providers and associations. CAI, NAHC, and CHC discourage this approach. Abrogating or prohibiting exclusive contracts will not assist the growth of a competitive marketplace in most situations, but it will deprive community associations of a method of obtaining otherwise unavailable services. The FCC should refrain from limiting exclusive service contracts.

[79] Appendix A, 2; Appendix B, Comments of Marjorie Meyer.

Although there are certainly occasions where incumbent monopolistic cable companies have leveraged their position as the single source of telecommunications services to force community associations and their residents into unfavorable or exclusive contracts,[80] a general limitation on all exclusive agreements is not an appropriate remedy. The option of an exclusive contract is an important aspect of the free market as well as an established right of property ownership. Despite circumstances where community associations must accept unbalanced agreements because of an incumbent provider's market power, certain exclusive agreements ensure the availability of telecommunications services and advance the development of competition.

A. Exclusive Contracts Provide Telecommunications Providers, Community Associations, and Residents with Benefits in Many Circumstances

As part of its inquiry, the FCC seeks comments on the benefits and burdens of exclusive contracts.[81] Although the paradigm of today's marketplace is shifting to favor the availability of multiple providers in lieu of exclusive arrangements,[82] exclusive contracts can still provide many benefits to providers, community associations, and residents.[83] Community associations and their residents are occasionally unable to attract certain telecommunications providers at all or secure favorable rates for residents without the option of entering into exclusive agreements. Without these options, some community

[80] See Appendix A, 2. About 12 % of providers refusing to provide associations with service did so because the association had an exclusive contract with another provider.
[81] *Notice of Proposed Rulemaking,* paragraph 53
[82] Currently, between 15-30% of associations have signed exclusive contracts. Smaller associations tend to sign fewer exclusive contracts than larger associations. Of associations that have signed exclusive contracts, most have lasting five years or less. Appendix A, 9-10.
[83] See, *Notice of Proposed Rulemaking,* paragraph 61.

associations would be unable to obtain telecommunications service or affordable rates, because providers determined the profit potential to be inadequate to justify the necessary investment.[84] An exclusive arrangement that guarantees a return for the provider is occasionally the only means to securing service for residents, and such an option should remain available.

Moreover, exclusive agreements in competitive environments may return significant benefits to residents who are able to secure new technology, high quality services, and lower prices because of the prospect of an exclusive contract. In fact, residents may actually receive more benefits from an exclusive contract in a competitive environment than they might otherwise in a monopolistic arena since providers would need to compete vigorously to secure any such agreement – competition that does not exist when only one provider is available. While the evolution of competition will likely dictate that any such arrangement is for a limited duration, the exclusive contract as a tool to deliver favorable services and prices to residents should not be restricted by limiting these exclusivity provisions.

Exclusivity provisions may also benefit incumbent or alternative telecommunications providers. Exclusivity allows providers to recoup installation, major maintenance, or technology upgrade costs. Telecommunications providers also can offer lower costs to community association residents in return for exclusivity.

[84] Of the providers refusing to serve associations, 24% indicated that the reason for doing so was because it was not cost effective. Appendix A, 2.

B. There are Constitutional, Legal, and Practical Impediments to Any Regulation Abrogating Exclusivity Provisions

In this proceeding, the FCC inquires whether any forced entry of rights of way would effectively abrogate exclusive contracts.[85] This type of regulation could certainly produce that result. With telecommunications providers having the capability to enter association property through utility rights of way, neither the association nor the incumbent provider could be held responsible for violating the contract. However, providers may decide not to install or upgrade equipment in associations, since they could not recover these costs without exclusivity. Associations would then have no or inferior quality service. Associations, because there would be no predictability of recovery of installation costs without exclusivity, could still become involved in any disputes between providers, raising association defense costs. The constitutional problems with taking association property would also still arise.

The *Notice of Proposed Rulemaking* also requests comments on whether existing exclusive provisions should be abrogated under certain circumstances.[86] While CAI has in the past stated that certain associations and residents could certainly benefit from a "fresh look" for existing exclusive contracts – especially perpetual contracts - permitting renegotiation when competitive providers enter a region,[87] CAI, NAHC, and CHC understand that there may be constitutional and legal impediments to such a situation.

[85] *Notice of Proposed Rulemaking,* paragraph 47.
[86] *Notice of Proposed Rulemaking,* paragraph 62.
[87] See, CAI Comments filed December 23, 1997 in response to the *Cable Inside Wiring Report and Order and Second Further NPRM*, 5-6.

In response to another FCC inquiry, abrogating or prohibiting exclusivity provisions would not guarantee entry.[88] Since the absence of competitive providers in many community associations is often because either there is no competition in an area or the providers have themselves refused to offer services in unprofitably situations, barring exclusivity provisions would have no effect on redressing the situation. As stated above,[89] community associations have requested proposals from telecommunications providers. In some of these cases, adding rather than prohibiting an exclusive contract might further expand the availability of services.

The FCC asks whether forced entry regulations and limitations on exclusive contracts should be promulgated simultaneously or independently.[90] The FCC should not promulgate either type of regulation, since both would impede the growth of the telecommunications marketplace.

While certain exclusive contracts may cause aberrations in the development of a competitive marketplace, others can also benefit community associations and residents. Therefore, the FCC should not implicate constitutional, legal, and practical issues by abrogating or prohibiting exclusive contracts. Exclusivity provisions should remain an option for community associations and residents.

IV. THE OTARD RULE SHOULD NOT BE EXTENDED TO COVER ADDITIONAL TYPES OF ANTENNAS

[88] *Notice of Proposed Rulemaking,* paragraph 64.
[89] Appendix A, 2; Appendix B, Comments of Marjorie Meyer; Comments of Palm Springs II Condominium Association.
[90] *Notice of Proposed Rulemaking,* paragraph 64.

In response to the Wireless Communications Association International's (WCAI) Petition for Rulemaking,[91] the FCC inquires whether it has the authority to extend the OTARD Rule to cover wireless fixed antennas.[92] Any extension of the OTARD Rule to cover antennas not included in Section 207 would be outside the purview of FCC's authority. In addition, the same takings issues that prevented the FCC from permitting individual DBS, television broadcast, and MDS antenna installation on common property would also apply to other types of antennas.

While the FCC correctly recognizes that Section 207 of the Telecommunications Act of 1996, does not grant the Commission the authority to preempt association restrictions on fixed wireless reception and transmission antennas, the Commission questions whether it has ancillary authority to extend the OTARD Rule.[93] In extending the OTARD Rule, the FCC would be regulating state and local government, community associations, and commercial and residential rental properties, entities over which the FCC has no authority absent that permitted by Congress. Without Section 207, the FCC has no authority to preempt community association restrictions on DBS, television broadcast, and MDS antennas. Since the FCC needed Section 207 in order to adopt the OTARD Rule, the FCC would need Congressional authorization to extend the Rule.

In Section 207, Congress clearly limited the FCC's authority to preempt community association restrictions. The legislative history to Section 207 states that

[91] Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Second 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Service (filed may 26, 1999).
[92] *Notice of Proposed Rulemaking,* paragraph 69.
[93] *Notice of Proposed Rulemaking,* paragraph 64.

> the Committee intends this section to preempt enforcement of state or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to zoning laws, ordinances, restrictive covenants or homeowners association rules, shall be unenforceable to the extent contrary to this section.[94]

From this history, it is clear that Congress only intended Section 207 to preempt restrictions on the three types of antennas listed in the statute. If Congress had intended for other types of antennas to be covered, then it would have included them within Section 207.

It is arguable that even assuming that the FCC had the authority to extend the OTARD Rule beyond the types of antennas covered by Section 207, the FCC is constrained by the OTARD analysis and decisions to adopt rules that would not take community association common property. In the *OTARD Second Report and Order*, the FCC correctly concluded that it did not have the authority under Section 207 to permit individual antenna installations on common property, because these installations would be a taking of common property.[95] If the FCC decided that the Commission did not have authority under a specific statute to take property, the Commission cannot now decide that it has authority to take common property pursuant to ancillary authority. Any extension of the OTARD Rule could not permit individual antenna installations on common property.

Extending the OTARD Rule to other types of reception and transmission antennas would create additional problems for community associations. Covering additional types of antennas would lead to an increase of antenna installations in community associations. Increased numbers of antenna

[94] House Committee Report, H. Rep. 104-204, at 124.
[95] *OTARD Second Report and Order*, FCC Recd at 23894-96, paragraphs 39-43.

installations threaten the integrity of community association individually-owned, exclusive use area, and common area property by increasing the possibility of improper installations. The safety of community association residents and personnel is also threatened by improper installation. In addition, increasing the number of antennas installed in an association reduces the property value for all properties in the association. The FCC should not increase the risk of damage and injury to association property, residents, and personnel and destroy property values by permitting additional types of antennas to be installed in community associations.

Since the FCC has no express authority to include other types of antennas within the scope of the OTARD Rule and cannot imply the authority to do so, the FCC should deny WCAI's Petition for Rulemaking.

V. THE CABLE INSIDE WIRING RULES SHOULD BE EXTENDED TO ALL TELECOMMUNICATIONS PROVIDERS

In the *Notice of Proposed Rulemaking,* the FCC inquires about the extension of its inside wiring rules to telecommunications providers, not merely MVPDs.[96] CAI has consistently supported the inclusion of all service providers, whether video or telecommunications, in the scope of the FCC's inside wiring rules.[97] Covering all providers under the same set of rules would simplify the rules for community associations, which as new consumers in this marketplace are often confused by complex telecommunications rules. With all providers covered under one set of rules, community associations

[96] *Notice of Proposed Rulemaking,* paragraph 68.
[97] See, CAI Comments filed December 23, 1997 in the *Cable Inside Wiring Second Further Notice of Rulemaking*, p.7.

would be able to negotiate wiring disposition agreements more quickly and effectively. Additional amounts of inside and home run wiring would be made available for use by alternative providers, promoting competition. Since including all providers under the inside wiring rules would promote competition without taking association property or limiting associations' bargaining power, community associations would support this change.

If the FCC were to promulgate forced entry regulations, however, any extension of the cable inside wiring rules would be moot, since no providers' right to remain on association property would be terminable.[98] The FCC should promote competition by extending the scope of the inside wiring rules, not destroy it by promulgating forced entry rules.

VI. THE FCC SHOULD SEEK TO ADOPT UNIFORM DEMARCATION RULES

The FCC also requests comments on any changes that should be made to its demarcation point rules that could promote competition in MTEs.[99] Since demarcation point rules define the point at which the rights and responsibilities of providers and MTEs for wiring change, any issues determined in this proceeding could potentially have a great impact on these rules.

Community associations would benefit from uniform demarcation rules for all telephony and video providers. With a single set of rules, community associations (and providers) would be able to determine more effectively when the shift in duties and responsibilities occurs. This will enable associations to more quickly and effectively negotiate agreements with telecommunications providers.

[98] See III, G supra.

The changes in the telecommunications marketplace also argue for a uniform set of demarcation rules. With telecommunications providers beginning to offer video services and MVPDs beginning to offer telephony services, it will be difficult to determine which set of demarcation rules should apply to any particular service offered by a certain provider. Developing a uniform set of rules will help promote competition in the MTE marketplace, as long as these rules preserve community association rights to protect and control association property.

While CAI, NAHC, and CHC support the development of uniform demarcation point rules, CAI, NAHC, and CHC are cognizant of the complex historical and technological factors that created the divergent demarcation rules. Due to these factors, it may be infeasible at this time to create this uniform set of demarcation rules. However, CAI, NAHC, and CHC support the principle of convergence, since convergence could assist in promoting competition.

VII. OTHER ACTIONS BESIDES FORCED ENTRY CAN BE TAKEN TO PROMOTE TELECOMMUNICATIONS COMPETITION IN THE MTE MARKETPLACE

The FCC requests comments on any other actions that the FCC can take to promote telecommunications competition within the MTE marketplace.[100] One way in which the FCC can promote the expansion of the telecommunications marketplace is to promote consumer education about the new alternatives in the telecommunications marketplace. CAI, NAHC, and CHC have recognized

[99] *Notice of Proposed Rulemaking,* paragraph 64.
[100] *Notice of Proposed Rulemaking,* paragraph 85.

that some community associations have not become players in the telecommunications marketplace because they have insufficient information about the available types of services and providers. Through presentations, seminars, and publications, CAI, NAHC, and CHC have consistently sought to educate their members about the changes in telecommunications services, so that community associations and community association professionals are aware of the potential of this new marketplace.[101] As a result of these efforts, CAI's, NAHC's, and CHC's members have begun to recognize and take advantage of these opportunities, negotiating arrangements for their associations that benefit residents and providers alike. CAI, NAHC, and CHC are committed to continuing these and other efforts, but any FCC assistance in informing the general public about the new technologies available would promote competition. With increased education, more consumers will be encouraged to select new technologies and providers.

The FCC can also promote competition in this marketplace by refraining from regulating it. The telecommunications marketplace is evolving rapidly. Since the marketplace is so dynamic, any rule the FCC promulgates today would be obsolete within months, if not sooner. The FCC cannot anticipate the changes in this marketplace rapidly enough to develop adequate solutions to perceived problems. The FCC should facilitate, not regulate, this increasingly competitive arena.

Conclusion

CAI, NAHC, and CHC actively support the development of a competitive telecommunications

[101] For example, see CAI's publications Getting Connected: The Community Association's Guide to Telecommunications Management, 1999; Satellite Dishes and Other Antennas: Model Rules and Guidelines for Planned Communities, Volume I

marketplace, since community association residents would then be able to receive advanced, competitive services from a variety of telecommunications providers at reasonable cost. The development of this marketplace will assist community association residents in obtaining the most current information and communications services available. However, the methods proposed in this *Notice of Proposed Rulemaking* would not aid the development of this advanced competitive marketplace. Forced entry proposals would take, damage, and destroy community association property solely for the benefit of telecommunications providers. Existing providers would be able to occupy available association space, preventing newer, more competitive providers from offering services at a later date. Forced entry would also deprive community associations of a fundamental right to control their own property, merely to benefit telecommunications providers.

Abrogating or prohibiting exclusive contracts would also place community associations at a disadvantage when negotiating service agreements. The right to grant exclusive use of association property permits community associations to negotiate for the installation of more advanced equipment or lower prices for services.

Similarly, the FCC should not extend the OTARD Rule to preempt community association restrictions on other types of reception and transmission antennas. The FCC does not have the authority to adopt such a regulation, which would create additional safety and security problems for community associations. Nor is it good public policy.

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APPENDIX A:

RESULTS OF CAI SURVEY OF COMMUNITY ASSOCIATIONS REGARDING TELECOMMUNICATIONS SERVICES IN COMMUNITY ASSOCIATIONS

CAI, NAHC, CHC COMMENTS IN
WT DOCKET NO. 99-217
CC DOCKET NO. 96-98
Submitted August 27, 1999

A NOTE ON CAI'S SURVEY OF COMMUNITY ASSOCIATIONS

CAI recognizes the FCC's need for information regarding the level of competition in the telecommunications marketplace. While CAI does not routinely collect information regarding telecommunications competition in community associations (unlike telecommunications providers, which collect such information as part of their normal business practice), CAI seeks to comply with the FCC's request. CAI has distributed a survey to all of its association, homeowner, manager, and attorney members asking them about the status of competition within their area and their association.

This appendix contains the results of surveys submitted to CAI in July and August 1999. Of the 353 respondents, 77 were associations of 1-50 units, 114 were associations of 51-150 units, 78 were 151-350 unit associations, 24 were 351-500 unit associations, and 51 were 501 or more unit associations. Most regions in the United States were represented in this survey. 144 respondents were located in urban areas, 177 in suburban areas, 11 in resort, and 18 in other areas.

CAI will continue its efforts to collect data regarding the state of telecommunications competition in community associations.